

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

David Tsehai Embaye,

Case No. 14-cv-2896 (PJS/TNL)

Plaintiff,

v.

REPORT & RECOMMENDATION

Minneapolis Police Department; Officer Omar Foulkes, Officer Brandon Kitzerow, and Officer Walter Ivan Alvarado, each in their individual and official capacities,

Defendants.

David Tsehai Embaye, OID #228576, MCF-Faribault, 1101 Linden Lane, Faribault MN 55021-6400 (*pro se* Plaintiff); and

C. Lynne Fundingsland, Minneapolis City Attorney's Office, 350 South Fifth Street, Room 210, Minneapolis MN 55415 (attorney for Defendants).

This matter is before the Court, United States Magistrate Judge Tony N. Leung, on Plaintiff's Second Motion to Amend Complaint. (ECF No. 52). The Court issued an Order granting the amended complaint, leaving for this Report and Recommendation the removal of the State of Minnesota as a party. (ECF No. 60, at 3 n.1). The Court now issues this report and recommendation to the district court, the Honorable Patrick J. Schiltz, District Judge of the United States District Court for the District of Minnesota, under 28 U.S.C. § 636 and D. Minn. LR 72.1.

On July 14, 2014, Plaintiff filed an action against the State of Minnesota ("State"), Minneapolis Police Department, and Officers Omar Foulkes, Brandon Kitzerow, and

Walter Ivan Alvarado. (ECF No. 1). On October 3, 2014, the State filed its Motion to Dismiss. (ECF No. 3). The State argued that Plaintiff failed to state a claim against it and that his action against the State was barred by the Eleventh Amendment. (State's Mem. in Support of Mot. to Dismiss, ECF No. 4). The remaining defendants filed a memorandum stating they did not object to the State's motion. (Defs.' Mem. in Resp., ECF No. 11).

After the State filed its motion to dismiss, Plaintiff sought to amend his complaint, making changes that included removing the State as a defendant. (ECF No. 18, 19). The Court permitted the amendment and ordered Plaintiff to submit his amended complaint. (ECF No. 23). In that Order, the Court asked all defendants to submit a brief addressing the impact the Amended Complaint had on the State's pending Motion to Dismiss. (ECF No. 23, at 1). The State submitted a letter on January 30, 2015, reasserting its arguments from its Motion to Dismiss and, interpreting Plaintiff's actions as a voluntary dismissal of his claims against the State, asking to be dismissed from this action. (ECF No. 31). Plaintiff responded in a letter, dated February 11, 2015, noting that the State is no longer a defendant and asking the Court to move forward with the matter. (ECF No. 34).

Plaintiff has since moved to amend his complaint for a second time. (ECF No. 43). The Court granted in part and denied in part his motion to amend, permitting Plaintiff to amend his complaint to assert claims against Officers Omar Foulkes, Brandon Kitzerow, and Walter Ivan Alvarado, each in their individual and official capacities. (ECF No. 49, at 2–5). Plaintiff's second amended complaint, like his first amended complaint, does not name the State of Minnesota as a party. (*See* ECF No. 43, 19). From other filings by Plaintiff, it is clear he no longer considers the State as a party to this action. (ECF No. 55,

at 3). Given that Plaintiff no longer seeks to assert claims against the State, the Court finds it proper to dismiss the State from this action pursuant to Fed. R. Civ. P. 41(a).

Based upon the foregoing, and all files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that the State of Minnesota be dismissed from this action.

Date: October 22, 2015

s/ Tony N. Leung
Tony N. Leung
United States Magistrate Judge
District of Minnesota

*David Tsehai Embaye v. Minneapolis
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File No. 14-cv-2896 (PJS/TNL)

NOTICE

Filing Objections: This Report and Recommendation is not an order or judgment of the District Court and is therefore not appealable directly to the Eighth Circuit Court of Appeals.

Under Local Rule 72.2(b)(1), “a party may file and serve specific written objections to a magistrate judge’s proposed finding and recommendations within 14 days after being served a copy” of the Report and Recommendation. A party may respond to those objections within 14 days after being served a copy of the objections. LR 72.2(b)(2). All objections and responses must comply with the word or line limits set for in LR 72.2(c).

Under Advisement Date: This Report and Recommendation will be considered under advisement 14 days from the date of its filing. If timely objections are filed, this Report and Recommendation will be considered under advisement from the earlier of: (1) 14 days after the objections are filed; or (2) from the date a timely response is filed.